WESTERN SLOPE GAS CO.

IBLA 81-462 Decided December 31, 1981

Appeal from decision of Colorado State Office, Bureau of Land Management, determining reappraised annual rental charges for natural gas pipeline right-of-way. C-1533.

Affirmed in part; set aside and remanded in part.

1. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of February 25, 1920

   An appraisal of a right-of-way for a natural gas pipeline, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1976), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. However, where the Bureau has determined the highest and best use of the land in order to evaluate the comparability of other lands, and an appellant raises sufficient doubt as to the accuracy of that determination, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

APPEARANCES: Marsha K. Wightman, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Western Slope Gas Co. has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 17, 1981, determining reappraised annual rental charges amounting to $5,530 for its natural gas pipeline right-of-way, C-1533, beginning May 1, 1981.

By decision dated April 19, 1979, appellant was granted a 50-foot wide and 4,530-foot long right-of-way for a buried lateral pipeline for a term of 44 years, pursuant to section 28 of the Act of February 25, 1920, as amended, 30 U.S.C. § 185 (1976). The effective date of the grant was August 1, 1965, when construction of the pipeline was commenced in trespass. Appellant filed an application for a right-of-way with BLM on March 15, 1967, and has paid all trespass and rental charges since 1965.

Section 28 of the Act of February 25, 1920, as amended, provides, in relevant part, that "the holder of a right-of-way * * * shall pay annually in advance the fair market rental value of the right-of-way * * * as determined by the Secretary * * *." 1/ 30 U.S.C. § 185(1) (1976). See 43 CFR 2883.1-2.

On October 30, 1980, BLM prepared an appraisal report (AR) valuing the right-of-way as of July 17, 1980. The land in question was initially divided into two units. Unit 1, containing approximately 2.7 acres, is situated in the SW 1/4 NE 1/4 and the SE 1/4 NW 1/4 sec. 14 and the SW 1/4 SE 1/4 sec. 15, T. 5 S., R. 81 W., Sixth principal meridian, Eagle County, Colorado. Unit 2, containing approximately 2.5 acres, is situated in the SE 1/4 NE 1/4 sec. 16, T. 8 S., R. 79 W., Sixth principal meridian, Lake County, Colorado. Unit 1 was further subdivided into unit 1A (located in sec. 14 and containing .92 acres) and unit 1B (located in sec. 15 and containing 1.78 acres). BLM arrived at an annual rental charge of $4,885 for unit 1A, $575 for unit 1B, and $70 for unit 2. For purposes of appraisal each unit was considered as a partial taking of a larger parcel.

In appraising the three units, BLM used the "comparable sales approach" set forth in Uniform Appraisal Standards for Federal Land Acquisitions (1973), established by the Interagency Land Acquisition Conference and adopted by the Department. 602 DM 1.3. Arm's-length transactions for neighboring lands were compared to arrive at a comparable sale price for the subject land. This market valuation was then multiplied by a rate of return factor of 10.25 percent to determine the annual right-of-way rental.

The basis for the comparison of land is an initial determination of the "highest and best use for which the property is clearly adapted."

1/ Fair market value is defined as: "[T]he amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978). Fair market value is then converted into "fair market rental value," as discussed, infra.

Uniform Appraisal Standards at 6-7; see BLM Manual 9311.23. Such "use" is defined in Uniform Appraisal Standards at 7:

> By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. [Emphasis added.]

See Olson v. United States, 292 U.S. 246, 255 (1934). The Uniform Appraisal Standards, further states at 7:

> Many things must be considered in determining the highest and best use of the property including: supply and demand; competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends.

Unit 1A is located within a residential subdivision of West Vail, "an area that is socially and economically a part of Vail; and will probably be annexed within the next few years" (AR at 3). The Town of Vail is described as follows:

> In the early 60's Vail, a town east of the confluence of Gore and Eagle rivers, was developed as a ski resort. From a meager establishment, it has grown rapidly to one of the nation's most prominent and affluent year-round recreation areas. Construction of Interstate Highway 70, which runs east-west through the state and through the town of Vail, has facilitated access from Denver and Grand Junction, as well as other cities via their airports.
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> Though Vail provides a wide variety of recreation, it is best known for it's [sic] skiing and as a summer convention center. Vail consciously caters to the overnight visitor (limited parking except for hotel and condominium residents, no lockers for daytime skiers) and consequently real estate values and construction has escalated. Vail has approximately 5,000 winter residents, 4,500 summer residents and 17,000 beds to accommodate tourists.

(AR at 3.)

Unit 1A is located parallel to an interstate highway and is accessible to frontage road, water, sewers, electricity, and gas. The area is zoned "resource," i.e., 35 acres required for each dwelling, because it is public land. However, the BLM appraiser notes that "if it was in private ownership it would most likely be zoned residential-suburban-low density (RSL) with 15,000 square feet required for a dwelling" (AR at 4). The appraiser also states that sale 31-12, through which the right-of-way passes, is also zoned RSL. She concludes that the highest and best use of unit 1A is "for residential development" (AR at 4). 2/

Unit 1B is located further west of unit 1A along the interstate highway. It is parallel to an unpaved two-lane road and "[n]o utilities or domestic facilities are available" (AR at 6). The area is zoned "resource." The BLM appraiser states that the highest and best use of unit 1B is "for low density residential development if zoning regulations could be waived. It also has value as a speculative investment" (AR at 6). 3/

Unit 2 is located 12 miles north of Leadville and 2 miles south of Climax. Leadville is described as the "primary community" in the area with an estimated 1980 population of 4,983 (AR at 7). "The economic base of the area is mining (ranging in scale from the world's largest Molybdenum mine to the summer hobbyist)" (AR at 7). "Residential development is increasing, notably mobile home parks along the main accesses to Leadville" (AR at 7). The unit straddles the two-lane paved Highway 91. There is no available water utilities or improvements. The area is zoned "for agriculture," i.e., 35 acres required

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2/ The calculations in the appraisal report for unit 1A are:

"Giving consideration to all pertinent factors, the land value of the larger parcel before taking is estimated to be $36,500 per unit, or $1,058,500 for the whole parcel (29 units) or approximately $103,571.43 per acre.

"The estimated fair market value of the rights conveyed is 50% of .92 acres (50 ft. x 799 ft.)

"Therefore: $103,571.43 x .92 = $95,285.72

$95,285.72 x 50% = $47,642.86

$47,642.86 x 10.25% (rate of return) = $4,883.39 or

$4,885 rounded annual rent."

3/ The calculations in the appraisal report for unit 1B are:

"The subject greater parcel; a 40 acre tract is comparable in all aspects except time. Therefore, giving consideration to all pertinent factors land value of the larger parcel is estimated to be $12,600 per acre.

"The estimated fair market value of the rights conveyed is 25% of 1.78 acres (1533.24 ft. x 50 ft.) 1.78 x $12,600 = $22,428 x 25% $5,607.00[.]

"Annual rental: $5,607 x 10.25% = $574.72 or $575 rounded[.]"

for each dwelling (AR at 7). The BLM appraiser concluded that the highest and best use of unit 2 is "for speculative investment" (AR at 7). 4/

In its statement of reasons for appeal, appellant contends that the highest and best use of units 1A and 1B is not for residential development. Appellant maintains that the probability of the land being developed as such is speculative. Appellant points to a number of factors which, it says, support this conclusion. First, both areas are zoned "resource" and "past history of this area indicates Eagle County has rarely granted a higher density zoning change" in such areas. Second, there is no evidence that sewer, water, gas, and electrical service have "excess capacity" to support residential development. Third, with regard to unit 1A: (1) the area was annexed to the Town of Vail January 1, 1981, and "rezoned as a Natural Open Space District," and the Town Planning Office "advised [appellant] * * * that no development will be allowed"; (2) 200 feet of the pipeline runs within 50 feet of the banks of Gore Creek, where the Eagle County Floodplain Regulations "preclude development"; and (3) it has been the policy of BLM to manage the area as a "buffer" and there has been "discussion" concerning designation of the area as part of an I-70 "utility and transportation corridor." Appellant also notes that sale 31-12 was purchased by the Town of Vail for use as a city park. Fourth, with regard to unit 1B: (1) the area is a "land slide, slope-failure complex," as acknowledged by the BLM appraiser, which diminishes its value for residential development, and (2) the area is "near public lands which are managed, in conjunction with the Colorado Division of Wildlife, as a critical winter range for elk," with which residential development would be "incompatible."

[1] The general standard for reviewing rights-of-way appraisals is to uphold the appraisal if there is no error in the appraisal methods used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. Northwestern Colorado Broadcasting Co., 49 IBLA 23 (1980); Full Circle, Inc., supra. Generally, in the absence of compelling evidence that a BLM appraisal is erroneous such an appraisal may be rebutted only by another appraisal or appraisals. James W. Smith, 46 IBLA 233, 235 (1980).

4/ The calculations in the appraisal report for unit 2 are:

"Giving consideration to all pertinent factors, the land value of the larger parcel before taking is estimated to be $700.00 per acre.

"The estimated fair market value of the rights conveyed are equivalent to 40% of 2.5 acres.

"Easement value: $700.00 x 2.5 acres - $1,750 x 40% = $700

"Easement rental: $700 x 10.25% = $71.75 or $70 rounded[.]"

The question presented in this case is whether the BLM appraiser correctly assumed that the highest and best use of units 1A and 1B was for residential development, i.e., whether such development was "reasonably likely." See Uniform Appraisal Standards at 7. The fact that an area is zoned "resource" is not conclusive in this regard. The appraisal report indicates that this is a zoning classification generally applicable to public lands. However, fair market value must be determined as if the land were being offered for sale on the open market. Accordingly, for purposes of the appraisal, the land was treated as private land. The BLM appraiser assumed that, as such, the land would likely be rezoned residential. The probability of rezoning, i.e., where it is not speculative or conjectural, may properly be considered insofar as it would reasonably be reflected in fair market value. Stark v. Poudre School District R-1, 560 P.2d 77 (1977); see Hinton v. Udall 364 F.2d 676, 681 (D.C. Cir. 1966).

Appellant's statement of reasons raises sufficient questions concerning the probability of rezoning for residential development as "to warrant BLM's reconsidering whether a further appraisal should be made, or, at least whether an adjustment in the appraised value is warranted." Full Circle, Inc., supra at 337.

While it appears that unit 1A is suitable for residential development and the necessary utilities are available, 5/ appellant's assertions suggest that at the time of the appraisal residential development was not "reasonably likely." Appellant contends that historically Eagle County has been reluctant to grant higher density zoning changes in areas zoned "Resource." 6/ This contention is hardly conclusive; however, appellant states further that unit 1A has now been rezoned as a natural open space district by the Town of Vail, and that appellant has been informed by the town planning office that no development will be allowed in such a district. In addition, appellant alleges that Eagle County flood plain regulations preclude development within 50 feet of the Gore Creek 100-year flood boundary and that the right-of-way in question runs parallel to and within 50 feet of the banks of Gore Creek for a distance of over 200 feet within unit 1A.

5/ Appellant's allegation that the local utilities do not possess sufficient capacity to support residential development does not, without more, call into question the BLM appraisal. There is no evidence that such utilities could not, without certain capital expenditures which are commonplace, be upgraded to meet the increased demand upon them.

6/ Appellant also submits a letter from Thomas Boni, Eagle County Planner, to BLM, dated Sept. 23, 1980, in which he identified "buffer areas" taken from the open space plan of the Eagle County Department of Community Development. These areas were presumably those which the county "desired to be protected." However, from the map enclosed with the letter, unit 1A is not within any of the delineated "buffer areas" and while unit 1B appears to be in close proximity to one such area the map is not sufficiently clear to determine whether unit 1B is actually in that area.

Appellant's contentions, while unsupported by documentary evidence, imply that at the time of the BLM appraisal a rezoning of unit 1A to RSL was conjectural or speculative, rather than probable. Since BLM has not had an opportunity to address appellant's concerns and the record does not present a basis for their resolution, we find that fairness dictates that the appraisal as to unit 1A be set aside and the case remanded to BLM for determination of the necessity for further appraisal or adjustment of the present appraisal.

We now turn to unit 1B. The BLM appraiser stated that the highest and best use of this property was for low density residential development, but that it also had value as a speculative investment. The only comparable sale utilized by BLM was a parcel of land (sale 31-3) acquired in 1979 "on the speculation that it may someday be subdivided." (AR at 7.) Sale 31-3 was zoned "resource." There was no surface water or utilities on the parcel and access was by a paved public road. The parcel is situated at the southern end of West Vail. The selling price for the parcel averaged $10,477.79 per acre. The BLM appraiser found unit 1B to be comparable in all aspects except time. The BLM appraiser estimated a value of $12,600 per acre for unit 1B. Our review of the appraisal report indicates that access to the unit 1B area is by unpaved road and that unit 1B is located farther from West Vail than the comparable parcel. Presumably, these factors would lessen the value of unit 1B as compared to sale 31-3. Most importantly, as pointed out by appellant unit 1B lies in a "land slide, slope-failure complex" which appellant asserts would diminish the value of the location as a site for residential development. Although the BLM appraiser, in setting the percentage of fee value of the land used by the pipeline, utilized 25 percent instead of the 50 percent she had used for unit 1A, 7/ it is not clear that this was meant as an adjustment for the nature of the land. Even if it were, it would appear that the nature of the land would also be relevant to the highest and best use of that land. If the soils are such that it would not be advantageous to build in the area, the land should not be considered as having potential for residential development, and that fact should be reflected in its fair market value. For the above-stated reasons, we also set aside the appraisal as to unit 1B and remand the case to BLM to determine whether a further appraisal is necessary or whether adjustments should be made to the present appraisal.

7/ At page 2 of the appraisal report the BLM appraiser stated:

"The percentage of fee value which the rights appraised consume varies. In the eastern portion of Unit 1 (in Section 19 [sic], 1A) the subject natural gas pipeline prohibits construction of a dwelling unit within it's right-of-way. Subdivision design could place lots to minimize any decrease in density, however, the pipeline would have an impact. It uses 50% of the fee value of the area within the right-of-way. The land around the western portion of Unit 1 (in Section 15, 1B) was classified as 'a landslide, slope failure complex' in a county wide geological study by Charles Robinson and Associates under House Bill 1041 Mapping Project. This pipeline would not be using more than 25% of the fee value. The northern segment of the eastern portion of Unit 1 would have a value similar to that of the western portion and is included in it's [sic] valuation. Unit 2 uses 40% of the fee."

Appellant has shown no specific error in the BLM appraisal with respect to unit 2, and it has presented no evidence that the rental charge for that unit is excessive. Accordingly, as to unit 2, the BLM decision is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to unit 2 and set aside as to units 1A and 1B and remanded to the Colorado State Office for further action not inconsistent herewith.

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Bruce R. Harris
Administrative Judge

We concur:

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Gail M. Frazier
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge